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Supreme Court, U.S.
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No. 95-997

In The

Supreme Court of the United States

October Term, 1995

LEWIS J. MERTZ,

Petitioner,

v.

THE CITY OF KEY WEST, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an appointed, or otherwise non-classified municipal employee, whose position is eliminated for budgetary reasons, and who is not entitled to a Civil Service Board hearing upon termination, may state a procedural due process claim under the Fourteenth Amendment where a constitutionally adequate post-deprivation remedy exists in state court.

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STATEMENT OF THE CASE

Petitioner, Lewis Mertz, was interviewed for and offered the newly created position of Police Major in the City of Key West Police Department. The offer was made by letter dated September 5, 1989, from Thomas E. Webster, who was at that time the Chief of Police. (R. 1-19-1). Chief Webster's letter contained a recitation of the terms of the offer, including the date for commencement of work; starting salary; rate and time of salary increases; amounts of allowances for automobile, gasoline, and clothing; a bonus of three weeks vacation time; a provision for compensatory time or overtime; and other benefits. (R. 1-19).

Chief Webster was specifically authorized by resolution of the City Commission to transmit the letter offer. (R. 1-19-12). The appointment of Petitioner to the position of Police Major was not made pursuant to the procedures set forth in the Civil Service Rules and Regulations, and some of the consideration provided pursuant to the letter was not generally available to similar employees of the City. Appellant accepted the offer of September 5, 1989, by letter dated September 14, 1989. (R. 1-19-1, 2).

As stipulated in the exchange of letters, Petitioner began his employment on October 18, 1989. He served in the position of Police Major until September 30, 1991, when his employment with the City of Key West ended upon the City Commission's elimination of the position of Police Major at the beginning of the new budget year. (R1-19-9).

During his time with the City of Key West, there were at least two separate occasions on which Petitioner

referred to his employment agreement in order to demand and receive from the City certain benefits which were provided to him in the letter of September 5, 1989, but which were not otherwise available to employees. On July 10, 1990, Petitioner transmitted an office memorandum to David Fernandez, Finance Director, pointing out that the annual leave balance reflected in his account did not conform

> . . . to the conditions of my employment and the agreement I reached with the City upon accepting my position.
>
> According to that agreement, I was to be credited with an additional three weeks (120 hours) annual leave. I would appreciate the appropriate adjustment of my leave balance to reflect this balance, in addition to that which I have accrued to date.

(R. 1-19).

Later that year, a question arose regarding Petitioner's right to accrue and utilize compensatory time.[1] On November 20, 1990, Petitioner met with the City

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[1] Compensatory time refers to a procedure whereby employees who work beyond their customary hours are compensated for the extra time by taking an equivalent amount of time without deduction from their otherwise accrued vacation or other leave time. By accumulating a lot of compensatory time, an employee could potentially take off as much time as he or she desires without diminishing the available bank of vacation or other leave time. In August 1990, the City Manager eliminated the use of compensatory time for management employees of the City.

Manager and Chief Webster to discuss the matter. Following that meeting, he transmitted an office memorandum to Mr. Fernandez dated November 29, 1990, with copies to the City Manager, Chief of Police, and Director of Human Resources. Significantly, Petitioner referred to the subject of his memorandum as "Employment Agreement". He further stated that he had met with the City Manager and the Police Chief,

> . . . to discuss the provisions of my employment agreement as regards the payment of overtime or compensatory time. After being supplied a copy of the employment agreement by me, the City Manager agreed that I should continue to earn overtime or compensatory time as provided therein.
>
> * * *
>
> Although I realize that oversights and errors can easily occur, I am concerned inasmuch as the City Manager indicated that he was unaware of the provisions of the employment agreement before he was provided a copy by me and inasmuch as his "City Policy on Compensatory Time," directed to you on August 24, 1990, was applied retroactively to erase the balance already accrued. . . .

(R. 1-19).

On both occasions, the City honored its contract with the Petitioner, providing the requested benefits.

As part of the budget process in July of 1991, the City Manager was directed by the Commission to submit a list of expenditures which could be eliminated. (R. 1-20). The

position of Major in the City of Key West Police Department was included on that list, and ultimately accepted by the Commission. (R. 1-20). The City Manager, Felix Cooper, notified Petitioner in a letter dated August 29, 1991, that the elimination of the Petitioner's position and consequent termination of his employment was on the City Commission agenda for September 17, 1991. (R. 1-19-9). Cooper's letter advised Mertz that his letter of agreement was considered to be an employment contract, and that since no term of employment was specified, his employment was considered to be terminable at will. Mertz and others had previously appeared before the Commission on various occasions to advocate retaining the position of Major. (R. 1-21).

When the position of Police Major was abolished, Petitioner was determined to be a contract employee by virtue of the nature and terms of his employment relationship. (R. 1-19). Contract employees and others appointed by the City Commission are not members of the civil service system.[2] (R. 1-20). Accordingly, Petitioner was not provided civil service benefits at that time. He did, however, attempt to file a grievance with the Civil Service Board regarding the termination of his employment. The Civil Service Board (which operates independently of the City Manager and the City Commission), unanimously determined that Mertz was a contract

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[2] The fact of whether Petitioner was a civil servant or not, thereby entitling him to certain procedural due process, remains disputed. Neither of the courts below made a specific determination as to Petitioner's employment status. However, for purposes of this Brief, we have assumed that Petitioner was a civil servant.

employee and therefore had no civil service eligibility. (R. 1-19). Following that decision, Petitioner did not pursue any state remedy, but simply proceeded to file suit in the United States District Court for the Southern District of Florida. (R. 1-1)

Petitioner filed suit in the district court alleging that he was a civil service employee and further contending that he had a property interest in his position which was taken from him without due process of law. (R. 1-1) Petitioner also claimed to have been denied equal protection on the basis that he was discharged from his employment on false, arbitrary, and unreasonable grounds.

The City of Key West filed a Motion for Summary Judgment, Or, Alternatively, To Dismiss For Failure To State A Claim On Which Relief Can Be Granted. (R. 1-11). The essence of the motion was that pursuant to the Eleventh Circuit Court of Appeals' decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), Petitioner's claim was one for violation of procedural due process. As the State of Florida had available procedures to rectify any due process violations which may have existed, Petitioner could not file suit in federal court. The City also asserted that Petitioner was a terminable-at-will contract employee not entitled to civil service protection.

The district court granted the City's Motion and summary final judgment was entered for the City of Key West on December 21, 1994. (R. 1-36, 1-41). The district court found that the Petitioner raised a substantive due process

claim which could not be pursued in federal court, applying *McKinney*.[3] Id. The district court also found that Petitioner could not pursue his procedural due process claim in federal court because a state court remedy for the alleged procedural violation had been available to him. Specifically, the district court found that Petitioner could have pursued the remedies of certiorari or mandamus.

Petitioner appealed the district court's decision to the Eleventh Circuit Court of Appeals. (R. 1-38). The Eleventh Circuit affirmed the district court's decision, relying on *McKinney, supra*. (Petitioner's Appendix A). The Eleventh Circuit further agreed with the district court that the State of Florida afforded Petitioner adequate remedies for his alleged procedural due process claims. (Petitioner's Appendix A).

ARGUMENT

The Court should not accept certiorari jurisdiction because the Eleventh Circuit Court of Appeals' decision does not conflict with *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), or any other decisions of the various circuits or of this Court.

As a preliminary matter, neither the district court nor the Eleventh Circuit Court of Appeals found that the Petitioner actually had a state-created property interest in his employment, despite the fact that Petitioner has

[3] Petitioner is not challenging the lower courts' rulings with respect to his substantive due process argument. (Petition for Writ of Certiorari at 11, n. 2).

framed the issue as one determining the constitutional rights of a "public employee with a state-created property interest in continued employment." (Petition for Writ of Certiorari at i).

Although Petitioner has framed the issue on appeal in such a way as to imply that he was in fact a "public employee with a state-created property interest in continued employment," that issue has not been determined in his favor. (Petition for Writ of Certiorari at "i", 10). Nor is the issue important since it is undisputed that Petitioner made no efforts whatsoever to avail himself of available state remedies to address his procedural due process concerns. Since *McKinney* holds that an employee must first avail himself of state remedies, it is clear that the Eleventh Circuit's opinion in this case is in accord with *McKinney*.

Only that portion of *McKinney v. Pate*,[4] 20 F.3d 1550 (11th Cir. 1994), which held that a public employee with a

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[4] In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), the Eleventh Circuit, sitting en banc, held that a state employee *possessing a state-created property interest in his employment* is entitled to assert only procedural due process claims, and has no substantive due process claim.

In *McKinney*, a building official was terminated, after he refused to resign, at the instruction of a member of the Board of County Commissioners. McKinney brought a federal claim under 42 U.S.C. § 1983, claiming that the reasons given for his termination were pretextual, and that the real reason was that he was strictly enforcing building codes to the distress of a commissioner, who was employed by a construction subcontractor.

The court noted that public employment cases are generally outside the scope of substantive due process, because they involve state-created rights, whereas substantive due process

state-created property interest in continued employment could not maintain his procedural due process claim in federal court is relevant here.[5]

The *McKinney* Court held that its prior case law was in error to the extent it allowed a terminated employee to bring a federal claim under § 1983 before utilizing state remedies which were appropriate and available. 20 F.3d at 1560. Even where the state's procedure is *inadequate*, no procedural due process claim arises until the state fails to remedy the inadequacy. Id., citing *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990). The appropriate forum for such claims is not a federal court, but a state court possessing the ability to remedy the alleged procedural defect. Such a forum could prevent or remedy the procedural imperfection, and thereby obviate any federal claim. *Id.* at 1561.

Procedural due process claims test the availability of an adequate procedure under state law, rather than the actual outcome of the proceedings. Thus, even if Petitioner suffered a procedural deprivation with regard to either his termination or the Civil Service Board's dismissal of his grievance, he nevertheless suffered no violation of his procedural due process rights unless the state

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arises only from the Constitution. 20 F.3d at 1556. Thus, a public employee has no claim for substantive due process in wrongful termination cases, and can only seek relief on a procedural due process theory.

[5] The Petitioner does not challenge the Eleventh Circuit's ruling on the substantive due process issue. (Petition for Writ of Certiorari at 11).

refused to provide a means to remedy the deprivation. *McKinney*, supra, at 1563.

Petitioner maintains that, unlike McKinney, he has stated a § 1983 procedural due process claim because he received no procedural due process whatsoever, as opposed to flawed or inadequate proceedings. As part of his argument on this point, Petitioner has maintained that he was a civil service employee. Civil service employees have rights that do not inure to employees who are not entitled to civil service protection.[6] The scope of those rights is not an issue here. The sole issue is whether the State of Florida affords due process to employees who claim to have been deprived of those rights. For purposes of this Court's function in reviewing the Petition for Writ of Certiorari, we will assume that Mertz was a civil service employee. Nevertheless, for the record, Respondent must correct factual misstatements made by Petitioner with regard to his employment status.

Contrary to Petitioner's suggestion, not all permanent employees of the City of Key West are entitled to civil service protection. Elected officials, appointments by the City Commission, contractual employees and employees holding positions not within the Classified Service are specifically not under the jurisdiction of the Civil Service Board, and are thus not entitled to civil service protection. It has been the position of the City of Key West throughout these proceedings that Petitioner

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[6] Respondent strenuously maintains that the Petitioner was a contract employee, as a result of which he was not entitled to civil service protection, and therefore is not entitled to the rights which accompany that protection.

was a contractual employee, and was thus not within the jurisdiction of the Civil Service Board.

Petitioner has argued that had he been properly treated as a civil service employee, he would have been entitled to a grievance hearing before the Civil Service Board to review the elimination of his position. The Petitioner is wrong for two reasons. First, neither the City Charter nor the Rules and Regulations of the Civil Service Board provides that the Civil Service Board has the authority or jurisdiction to review a decision of the City Commission which eliminates a position for *budgetary reasons*.[7] Second, if the Petitioner was entitled to civil service status, he would not be entitled to a grievance hearing to review the elimination of his position for budgetary reasons.

Petitioner maintains that his procedural due process claim is not barred by *McKinney*, as he received *no* process. Petitioner argues that *McKinney v. Pate* is only applicable where a terminated employee has been afforded deficient process. In other words, Petitioner asserts that *McKinney* does not apply where no due process was afforded. It is difficult to determine the basis for Petitioner's conclusion. If anything, an employee who has been afforded *no* due process has an even better chance of availing himself successfully of state court procedures, which are faster and less expensive. Petitioner has not

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[7] The establishment of a budget by the City Commission is a legislative function. *House of Representatives v. Martinez*, 555 So.2d 839 (Fla. 1990). The Civil Service Board is prohibited by the doctrine of separation of powers from reviewing or overruling legislative determinations by another agency. *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991).

cited to any portion of the lower courts' opinions imposing such a limitation, and Respondent has been unable to find such a restriction in either decision.

McKinney happened to involve an employee who was terminated for allegedly pretextual reasons and who was afforded a hearing. As the Eleventh Circuit observed, McKinney was given written notice of the charges against him, an explanation of the evidence against him, and an opportunity to present his side of the story. However, nothing in the opinion suggests that *McKinney* is limited in its application to situations where a hearing is held, but the hearing is alleged to be defective.

Even were Petitioner correct, the limitation that he reads into *McKinney* would not operate to his benefit. Petitioner erroneously believes that the elimination of his position for budgetary reasons entitled him to a hearing *prior* to his discharge. This reasoning of course presupposes that Petitioner was entitled to civil service protection, which remains vigorously disputed. Petitioner relies upon pre-*McKinney* cases for the proposition that a constitutional deprivation exists where no hearing was allowed, even if post-deprivation remedies are provided through state law. According to Petitioner, a claim pursuant to 42 U.S.C. § 1983 exists for the deprivation of procedural due process rights where no hearing was held, regardless of the availability of post-deprivation remedies through the state court system.

The pre-*McKinney* cases which Petitioner urges conflict with the lower courts' decisions in this case are no

longer viable in light of *McKinney*. Even if those authorities remain valid, they have no application in this instance.

First, Petitioner was not entitled to a pre-termination hearing. Secondly, notwithstanding that he was not entitled to a pre-termination hearing, Petitioner was given notice that a hearing was going to be held on the elimination of his position, and was given an opportunity to appear at that hearing. Notably, Petitioner was *not* terminated because of alleged misconduct. Accordingly, this is not a situation where it would have been necessary or appropriate or even possible to provide Petitioner with written notice of any "charges" against him, and an evidentiary hearing on those charges. Petitioner lost his employment with the City of Key West because his position was eliminated for budgetary reasons.

Even the Rules and Regulations of the City of Key West Civil Service Board, upon which Petitioner sought to rely below, do not mandate a pre-termination hearing when the City Commission eliminates a position for budgetary reasons. Rule VI, Sub-Part E, Section 1.0 of the City's Rules and Regulations addresses the rights afforded an employee when his position is abolished, providing that an employee whose position is eliminated due to court action or Commission abolishment of his position is entitled to be placed back in the last permanent position he previously held. The rules do not allow for a pre-termination hearing when an employee's position is *eliminated*.

The City Code also enunciated procedures to be followed when the position of a civil service employee was

eliminated for budgetary reasons.[8] The City Code does not even provide for a hearing when an employee is being demoted or discharged for cause, let alone when an employee is being discharged because of budgetary reasons.[9] The only provision in the Personnel Policy Manual pertaining to an elimination in a position due to a reduction in force also does not provide for a pre-termination hearing.[10]

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[8] Code § 6.15: Reduction in Number of Employees

> Whenever it shall appear to the city manager than (sic) an excessive number of persons are employed within any department of the city or, due to budget adjustments, there will be an excess of persons employed within any department of the city, said city manager shall inform the city commission and include the reasons therefor that have caused or will cause an excess of employees within city government. The city manager shall provide to the civil service board the name and title of each employee terminated for inclusion within the civil service preferred list.

This provision does not allow for a hearing, but does call for the inclusion of the employee's name on the civil service preferred list.

[9] Code § 6.13 applies where the City is terminating or disciplining an employee because of misconduct or a failure to properly perform. In such circumstances, no action shall be taken except for cause shown upon written charges or violation of the City's personnel policy rules and regulations or rules of the Civil Service Board.

[10] The pertinent provision provides:

> e. Reduction in Force
>
> When the demand for service in a particular field decreases to the point that it is apparent that there is an excess of employees within that field, the City shall attempt in all cases to transfer those employees

In short, none of the rules and regulations promulgated by the City of Key West through the Civil Service Board, or otherwise, provide for a pre-termination hearing where a position is being eliminated for budgetary reasons. And since a budget-induced termination has nothing to do with the employee's performance or conduct, even if we assume that Mertz was a civil service employee, he still was not entitled to a pre-termination hearing when his position was eliminated for budgetary reasons. *Hatcher v. Board of Public Educ. and Orphanage*, 809 F.2d 1546 (11th Cir. 1987). In *Hatcher*, the court addressed the claim of a school principal who had been demoted as a result of the closing of the school at which she had been principal. In total, six principals were displaced as a result of school closings, but only three principal positions were available at the time of the closings.

The court concluded that the Board was not required to grant Hatcher a hearing at the time the schools were closed and the initial reassignments were made. Hearings were not required until later stages in the process, when

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not needed to vacant positions of the same class in the same or other departments. However, when this is not possible, a reduction in force must take place, and the City Commission shall be so advised by the City Manager.

In making discharges, the person who stands lowest in rank or grade *and lowest in point of seniority* shall be first laid off. Persons discharged under these circumstances shall be placed on a preferred list in Civil Service files and re-employed according to the rules laid down in the Civil Service Board Rules and Regulations and in labor agreements, where applicable. (emphasis added).

positions were assigned to individuals who did not hold a property interest in the position rather than to Hatcher and others similarly situated.

Although *Hatcher* is to a large extent limited to its facts, it demonstrates that a pre-termination hearing is not constitutionally required in every situation where a position is being eliminated for budgetary reasons. The reason why a pre-termination hearing is not required when a position is being eliminated for budgetary reasons is readily apparent. This is a discretionary function of a legislative body. In most instances, as here, the employee has notice of the public session at which the budget is to be discussed and adopted, and thus has an opportunity to be heard.

An employee rarely can present any information or evidence which will convince a public body that sufficient money exists to retain a position, or that the position is so valuable that it must be retained despite economic hardship. On the other hand, when an employee is being terminated for reasons related to the employee's own conduct, the employee can often present evidence to refute the charges against him. In the instant case, Petitioner has not identified anything that he would have said or done at an individual pre-termination hearing which could not have been raised at the Commission's budget meeting of September 17, 1991. Nothing could have been said or done by Petitioner or anyone else whose position was eliminated, which would have altered the Commission's decision.

Despite the fact that Petitioner was *not* entitled to a pre-termination hearing, the fact remains that he was

actually afforded an opportunity to be heard. Petitioner was given advance notice that his position was likely to not be included in the budget. The City Manager notified Mertz in a letter dated August 29, 1991, that the elimination of his position and consequent termination of his employment was part of the budget adoption which was on the City Commission agenda for September 17, 1991. Petitioner and others had previously appeared before the Commission on various occasions to advocate retaining the position of Major. Petitioner had the opportunity to appear at the September 17, 1991, hearing along with his supporters to argue why his position should not be eliminated. That opportunity to be heard, coupled with the post-termination remedies afforded by the State of Florida satisfies any procedural due process concerns to which Petitioner may have been entitled.

No set format exists for a constitutionally sufficient pre-termination hearing. As identified by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1984), the essential requirements of due process are notice and an opportunity to respond. Petitioner was afforded both notice and an opportunity to respond by the City Commission. He received due process. Thus, the Eleventh Circuit's decision does not conflict with *Loudermill* as Petitioner contends.

Petitioner also asserts that he was afforded *no* due process at all because the Civil Service Board improperly refused to hear his grievance, thus further depriving him of due process. Whether the Petitioner was entitled to civil service protection is not at issue here. The Civil Service Board considered Petitioner's request to pursue a

grievance, and determined that it did not have the jurisdiction to afford such relief to Petitioner.

Instead of pursuing state court remedies to compel the Civil Service Board to provide him with a hearing, Petitioner filed suit in the district court pursuant to 42 U.S.C. § 1983. Pursuant to *McKinney*, Petitioner has no cause of action for this alleged deprivation of procedural due process, as the State of Florida affords him adequate remedies for the alleged deprivation.

A procedural due process violation is not complete "unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 123 (1990). In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state *refuses* to provide a process sufficient to remedy the procedural deprivation is there a constitutional violation actionable under § 1983. *McKinney*, 20 F.3d at 1557. The focus therefore is not whether Appellant was afforded deficient due process or even none at all by the City; rather, the focus is on whether the State of Florida affords a process sufficient to remedy the alleged procedural deprivation. As the Eleventh Circuit concluded in *McKinney*, Florida courts have the power to review employment termination cases. That authority includes the power to remedy deficiencies and to cure violations of due process.

Finally, the Petitioner had available to him state court relief in the form of either certiorari or mandamus. In the absence of a method of review contained in the statute under which an administrative body operates, the quasi-judicial actions of an administrative agency may be reviewed through a writ of certiorari to Florida's circuit

courts. *Dabbs v. City of Tampa*, 613 So.2d 1378, 1379-1380 (Fla. 2d DCA 1993) (citing *Teston v. City of Tampa*, 143 So.2d 473 (Fla. 1962)). The October 23, 1991, decision of the Civil Service Board was a quasi-judicial action.

The Civil Service Board only has jurisdiction to hear the grievances of those individuals who fall within the Civil Service Rules and Regulations. Those employees not covered by the Civil Service Rules and Regulations are not within the jurisdiction of the Civil Service Board.[11] In determining that Mertz was not covered by the Civil Service Rules and Regulations, the Civil Service Board was making a determination that, as a matter of law, it lacked jurisdiction to act. An organization's determination that it lacks jurisdiction qualifies as a judicial or quasi-judicial action.

A decision by a civil service board that it lacks jurisdiction has been determined by a Florida appellate court to be a quasi-judicial decision properly reviewable by certiorari. *DeNigris v. City of Fort Lauderdale*, 518 So.2d 469 (Fla. 4th DCA 1988) (decision of city civil service board that it lacked jurisdiction over police officer's appeal was a quasi-judicial decision properly reviewed by petition for writ of certiorari). No authority holds to the contrary.

Certiorari was available to Petitioner as a remedy. Petitioner filed a written submission to the Civil Service Board. The minutes of the meeting of the Civil Service Board on October 23, 1991, coupled with the letters between Appellant and Appellee documenting the terms

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[11] *The City of Key West Civil Service Board Rules and Regulations*, Rule I, Sub-Part F, § 1.0.

of Appellant's employment, Appellant's written submission and the Charter, Code and Personnel Policies cited by Appellant to this Court provided an ample record on which a state court could have determined whether the Civil Service Board improperly interpreted its own rules and regulations and erroneously declined to accept jurisdiction over Appellant's claim.

Alternatively, mandamus would have been an available remedy. Petitioner could have filed a petition for writ of mandamus seeking to compel the Civil Service Board to afford him a full hearing, pursuant to adequate notice, on the issue of his entitlement to civil service protection.

Florida appellate courts have routinely held that mandamus is an appropriate remedy to test the correctness of a determination of no jurisdiction. *Pino v. District Court of Appeal, Third District*, 604 So.2d 1232 (Fla. 1992); *New Hampshire Ins. Co. v. Calhoun*, 341 So.2d 777 (Fla. 2d DCA 1976), aff'd., 354 So.2d 882 (Fla. 1978). If, after a full hearing pursuant to notice, the Civil Service Board still maintained that it did not have jurisdiction over Mertz, Mertz would have a record and a quasi-judicial decision to pursue certiorari review.

Finally, Mertz could have filed a declaratory judgment action, pursuant to Florida Statutes Chapter 86, to obtain a finding as to whether he was entitled to the protection afforded by the Civil Service Rules and Regulations.

A declaratory judgment action would have enabled Mertz to establish his claimed status as a civil service employee entitled to due process. Florida Statutes

§ 86.011 authorizes the circuit court to declare "rights, status and other equitable or legal relations." In making such a declaration the circuit court may also declare any fact upon which the declaration depends. Thus, the circuit court was authorized to declare whether Petitioner was a civil service employee even if factual determinations must first be made.

The circuit court is authorized pursuant to Florida Statutes § 86.021 to construe statutes and regulations made under statutory authority or municipal ordinance. The circuit court therefore had authority to construe the code provisions relied upon by the Petitioner. A declaratory judgment action also would have enabled Mertz to obtain a determination of his rights under his contract with the City. *Sorrentino v. Barwick*, 412 So.2d 55 (Fla. 4th DCA 1982); *Ennis v. Warm Mineral Springs, Inc.*, 203 So.2d 514 (Fla. 2d DCA 1967), cert. den., 210 So.2d 870 (Fla. 1968).

Had Petitioner established through a declaratory judgment action that he was entitled to civil service protection, he could then have requested that the circuit court direct the Civil Service Board to afford him a hearing. Florida Statutes § 86.061 authorizes the circuit court to grant further relief based on a declaratory judgment when necessary or proper.

In summary, Petitioner had adequate remedies available to him in the Florida state court system. He chose not to pursue those remedies, choosing instead to file suit in federal court. Pursuant to the court's decision in *McKinney v. Pate, supra*, Petitioner made the wrong choice.

CONCLUSION

The Eleventh Circuit Court of Appeals' decision does not conflict with *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) or any other decisions of this Court or the various circuits.

For the foregoing reasons, the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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